SIM KEE GUAN

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CRIMINAL APPLICATION NO. 54-4-88]
5 MAY 1988

CRIMINAL PROCEDURE: *Right of accused to be represented by legal practitioner of his choice - Extent of that right - Circumstances under which the Court could direct that a detained person be produced.*

This was an application by the accused who was prosecuted upon a capital charge to be defended by a legal practitioner of his choice who or whom was being detained by the executive. The application was made pursuant to r. 93(1), International Security (Detained Persons) Rules 1960.

Held:

[1] The right of a person who was arrested to be defended by a legal practitioner of his choice under Article 5(3) Federal Constitution and under s. 255, Criminal Procedure Code was not an unqualified right. Since the legal practitioner concerned was being detained he was not able to represent the accused.

[2] The legal practitioner concerned was not the only legal practitioner who had the experience and professional expertise to defend the accused. Thus, there was no necessity or need for the Court to direct the said legal practitioner be brought to Court in order for the Court to arrive at a just decision. It was a condition precedent before r. 93(1), Internal Security (Detained Persons) Rules 1960 could be invoked that the Court required the presence of the detained person. The condition precedent had not been satisfied.

[Application dismissed.]

Cases referred to:

Naresh v. Kanar Lal [1952] AIR Cal 852
Watneys Mann, Ltd. v. Langley [1963] 3 All ER 967
Lim Kit Siang v. United Engineers (M) & Ors. [1988] SCR 1

Legislation referred to:

Criminal Procedure Code, s. 255
Federal Constitution, art. 5(3)
Internal Security (Detained Persons) Rules 1960, r. 93(1)
Internal Security Act 1960, ss. 57(1)(a), (b)

For the accused - Manjit Singh (S. Asamaley with him); M/s. Karpal Singh & Co.
For the public prosecutor - Bazain bin Idris, DPP

JUDGMENT

Edgar Joseph Jr J:

The question of law central to this application is whether an accused person in this country who is being prosecuted upon a capital charge can exercise his constitutional right under Article 5(3) to be defended by a legal practitioner of his choice notwithstanding the fact that the latter is being detained under the laws relating to executive detention.

Most particularly, the applicant herein is one Sim Kee Guan, who is being prosecuted on two counts, one for having in his possession, without lawful excuse, in a security area, a firearm and the other for having in his possession, in like circumstances, four live rounds of ammunition, in contravention of ss. 57(1)(a) and (b) of the Internal Security Act 1960 ("the Act") respectively. Upon conviction, each offence carries a mandatory death sentence. The applicant's trial is scheduled to commence in precisely four days' time.

The application, which was by notice of motion supported by affidavit evidence, was made under the provisions of r. 93(1) of the International Security (Detained Persons) Rules 1960, ("the Rules").

The legal practitioner by whom the applicant desires to be defended upon the above-mentioned charges is Mr. Karpal Singh who, it is accepted, has extensive experience of practice on the criminal side but who is presently being held in detention at Tempat Tahanan Perlindungan, Taiping, by virtue of a detention order, issued pursuant to the provisions of the Act.

I must now confront the question of law posed in the opening paragraph of this judgment.

The starting point of my examination of the legal position has to be Article 5(3) which provides:

> Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

The next provision to be borne in mind is s. 255 of the Criminal Procedure Code which, shorn of immaterial parts, provides:

> ... every person accused before any Criminal Court may of right be defended by an advocate.

It is obvious from the Constitutional and Codified provisions aforesaid that the right to consult and be defended is a right of the person arrested and not a duty of Counsel requested. But, more importantly, is that right unqualified? I think not. As was said by the then Chief Justice in the unreported case of *Palaniappa Chettiar v. Arunasalam Chettiar* FM Civil Appeal No. 34/1958 quoted in the 1961 MLJ xxxiii (Practice Note):

> It is wrong to say, as is frequently said, that a litigant is entitled to be represented by the Counsel of his choice. The true statement is that he is entitled to be represented by the Counsel of his choice if that Counsel is willing and able to represent him.

When, therefore, as here, the Counsel concerned is the subject of a detention order under preventive detention legislation, it cannot be said that he is able to represent the accused even though he may be more than willing to do so.

I would, therefore, answer the central question of law in the negative.

That, however, does not conclude the matter for, a subsidiary question which arises upon this application is: whether, in the circumstances of this case and, quite apart from Article 5(3), the Court is empowered to order the production of Mr. Karpal Singh under r. 93(1) of the Rules which provides:

> Whenever the presence of a detained person is required by any Court of civil or criminal jurisdiction such Court may issue an order addressed to the superintendent requiring production before the Court of such person at the time and place to be named in such order, and the said superintendent shall cause the person named in such order to be brought up as directed, and every such Court may by endorsement on such order require the person named therein to be again brought up at any time to which the matter wherein such person is required may be adjourned. (Emphasis supplied).

It is manifestly clear that under r. 93(1) a condition precedent for the Court to invoke its power to order production of a person detained is that "the presence of the detained person must be required by the Court" and the Court alone. In other words, the mere fact that an accused may require the production of the person detained is not conclusive of the matter though, of course, it is a relevant consideration.

I must next ask myself what the word "required" in r. 93(1) means. It seems to me that the word "required" is something more than the word "desired". Although the element of need is present in both words, the real distinction between "required" and "desired" lies in the insistence of that need. In other words, there is an element of "must" or "necessity" in the case of "required" which is not present in the case of mere "desire": see *Naresh v. Kanar Lal* [1952] AIR Cal 852 and *Watneys Mann, Ltd. v. Langley* [1963] 3 All ER 967.

Having made these general observations regarding the actual wording of r. 93(1), I must next direct my attention to the issue of critical substance regarding this part of the case: Can it be said that the presence of Mr. Karpal Singh is required by this Court for the purpose of conducting the defence of Sim Kee Guan?

In my view, I can only answer this question in the affirmative if I am satisfied that Mr. Karpal Singh's attendance in Court for the purpose stated is necessary in order to arrive at a just decision in the case.

Now, it has not even been alleged that the trial of Sim Kee Guan will involve difficult questions of law but, even if it does, can it be said, that for purpose of conducting his defence, Mr. Karpal Singh possesses experience of a nature not available amongst advocates and solicitors in Malaysia? With respect, I would say, "No".

It follows, then, that the condition precedent for invoking the power to order production of a detained person under r. 93(1) namely, that his presence must be "required" by the Court", not having been satisfied, I must answer the subsidiary question posed above in the negative.

A final point needs to be made. In *Lim Kit Siang v. United Engineers (M) & Ors.* [1988] SCR 1, Mr. Karpal Singh, although under detention, did appear as Counsel for the respondent but this was not pursuant to an order of Court under r. 93(1) but by reason of an order made by the Minister of Home Affairs under s. 18 of the Act which gives the latter a wide discretion to order the production of a detainee. *Lim Kit Siang's* case (*ibid*) is, therefore, distinguishable.

In all the circumstances, I have no discretion in the matter, and so, this Application is dismissed.

Also found at [1988] 2 CLJ 119